

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

JESSE I. GOMEZ,

Plaintiff,

v.

KINGS COUNTY SHERIFF
DEPARTMENT, et al.,

Defendants.

Case No. 1:21-cv-01170-NONE-BAM

**FINDINGS AND RECOMMENDATIONS
REGARDING DISMISSAL OF CERTAIN
CLAIMS**

(Doc. 9)

FOURTEEN-DAY DEADLINE

Plaintiff Jesse I. Gomez (“Plaintiff”) is a county jail inmate proceeding pro se and in forma pauperis in this civil rights action under 42 U.S.C. § 1983. On August 20, 2021, the Court screened Plaintiff’s complaint and granted him leave to amend. (Doc. 6.) Plaintiff’s first amended complaint, filed on September 8, 2021, is currently before the Court for screening. (Doc. 9.)

I. Screening Requirement and Standard

The Court is required to screen complaints brought by prisoners seeking relief against a governmental entity and/or against an officer or employee of a governmental entity. 28 U.S.C. § 1915A(a). Plaintiff’s complaint, or any portion thereof, is subject to dismissal if it is frivolous or malicious, if it fails to state a claim upon which relief may be granted, or if it seeks monetary

1 relief from a defendant who is immune from such relief. 28 U.S.C. §§ 1915A(b);
 2 1915(e)(2)(B)(ii).

3 A complaint must contain “a short and plain statement of the claim showing that the
 4 pleader is entitled to relief” Fed. R. Civ. P. 8(a)(2). Detailed factual allegations are not
 5 required, but “[t]hreadbare recitals of the elements of a cause of action, supported by mere
 6 conclusory statements, do not suffice.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell*
 7 *Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). While a plaintiff’s allegations are taken as
 8 true, courts “are not required to indulge unwarranted inferences.” *Doe I v. Wal-Mart Stores, Inc.*,
 9 572 F.3d 677, 681 (9th Cir. 2009) (internal quotation marks and citation omitted).

10 To survive screening, Plaintiff’s claims must be facially plausible, which requires
 11 sufficient factual detail to allow the Court to reasonably infer that each named defendant is liable
 12 for the misconduct alleged. *Iqbal*, 556 U.S. at 678 (quotation marks omitted); *Moss v. U.S. Secret*
 13 *Serv.*, 572 F.3d 962, 969 (9th Cir. 2009). The sheer possibility that a defendant acted unlawfully
 14 is not sufficient, and mere consistency with liability falls short of satisfying the plausibility
 15 standard. *Iqbal*, 556 U.S. at 678 (quotation marks omitted); *Moss*, 572 F.3d at 969.

16 **II. Plaintiff’s Allegations**

17 Plaintiff is currently housed at the Kings County Jail and is a pretrial detainee. Plaintiff
 18 names the following defendants: Sr. Deputy Fausnett and Deputy Verhoeven. In his sole
 19 amended claim, Plaintiff asserts violations of the Eighth and Ninth Amendments of the United
 20 States Constitution. He alleges as follows:

21 On 1/8/2001 I was pulled over for felony evading on Sherman Ave in Corcoran
 22 California. Upon exiting the car with hands up, is when Deputy Fausnett released
 23 his K9 dog “Dash.” Immediately after K9 locked & bit my arms is when Officers
 24 Fausnett & Verhoeven began their excessive force & police brutality. Fausnett
 25 struck me behind the head with fist while dog was mauling at me. I attempted to
 26 cover my face from the viscious [sic] dog and punches thrown by defendants. At
 27 this point K9 dog Dash began biting my right pinky finger chewing/mauling the
 28 flesh til he severed it from my body. During this whole time I was undergoing the
 dog whipping [sic] off my finger Defendants continued to beat me violently. I was
 screaming for my life and begging defendants to stop but they didn’t. Defendants
 Fausnett & Verhoeven beat me badly and even mocked me by picking up my pinky
 finger while placing me in the ambulance stating: “Do you want your pinky back.”
 [¶] Further more at no time was any attempt made to save my finger. I have no clue
 what officers did with my finger still to this day. While in hospital officers cite and
 released me. I also had to have surgery on my right hand. My bone was sticking

1 out from where finger used to be. Doctors cut my bone with surgical scissors and
 2 stitched my hand. I had about (7) seven stiches in my right hand and (6) six stiches
 in left hand. I sat in Fresno Regional Center for about 5 day(s).

3 (Doc. 9 at 3-4.) Plaintiff requests compensatory and punitive damages. (*Id.* at 5.)

4 **III. Discussion**

5 **A. Excessive Force**

6 Although Plaintiff appears to base his excessive force claim on the Eighth Amendment, a
 7 claim of excessive force in the context of an arrest or investigatory stop implicates the Fourth
 8 Amendment right to be free from “unreasonable ... seizures.” U.S. Const. amend. IV; *see Graham*
 9 *v. Connor*, 490 U.S. 386, 394 (1989). “Determining whether the force used to effect a particular
 10 seizure is ‘reasonable’ under the Fourth Amendment requires a careful balancing of ‘the nature
 11 and quality of the intrusion on the individual's Fourth Amendment interests’ against the
 12 countervailing governmental interests at stake.” *Graham*, 490 U.S. at 396 (citations omitted).
 13 Whether a law enforcement officer’s use of force was “objectively reasonable” depends upon the
 14 totality of the facts and circumstances confronting him. *Smith v. City of Hemet*, 394 F.3d 689, 701
 15 (9th Cir.) (en banc) (quoting *Graham*, 490 U.S. at 397), cert. denied, 545 U.S. 1128 (2005).

16 A court must “first assess the quantum of force used to arrest the plaintiff by considering
 17 the type and amount of force inflicted.” *Drummond v. City of Anaheim*, 343 F.3d 1052, 1056 (9th
 18 Cir. 2003) (internal quotation marks and brackets omitted). Second, a court balances the
 19 government’s countervailing interests. This involves considering “the severity of the crime at
 20 issue, whether the suspect poses an immediate threat to the safety of the officers or others, and
 21 whether he is actively resisting arrest or attempting to evade arrest by flight.” *Graham*, 490 U.S.
 22 at 396. Using these factors, a court must determine “whether the force employed was greater than
 23 is reasonable under the circumstances.” *Drummond*, 343 F.3d at 1058.

24 Liberally construing the allegations in the first amended complaint, the Court finds that
 25 Plaintiff alleges a cognizable claim for excessive force in violation of the Fourth Amendment
 26 against Defendants Fausnett and Verhoeven.

27 **B. Deliberate Indifference to Medical Needs**

28 Although not entirely clear, Plaintiff appears to be attempting to assert a claim regarding

1 his medical needs against defendants. A claim of inadequate medical care brought by a pretrial
2 detainee arises under the Fourteenth Amendment and is governed by an “objective deliberate
3 indifference standard.” *See Gordon v. County of Orange*, 888 F.3d 1118, 1124-1125 (9th Cir.
4 2018). In order to state a claim against any defendant for denial of medical care while a pretrial
5 detainee, Plaintiff must allege that the defendant: (1) “made an intentional decision with respect
6 to the conditions under which the plaintiff was confined”; (2) the “conditions put the plaintiff at
7 substantial risk of suffering serious harm”; (3) the “defendant did not take reasonable available
8 measures to abate that risk, even though a reasonable official in the circumstances would have
9 appreciated the high degree of risk involved—making the consequences of the defendant’s
10 conduct obvious”; and (4) “by not taking such measures, the defendant caused the plaintiff’s
11 injuries.” *Gordon*, 888 F.3d at 1125.

12 Liberally construed, Plaintiff’s first amended complaint alleges a deliberate indifference
13 claim against defendants in connection with their purported failure to save Plaintiff’s severed
14 finger.

15 **C. Ninth Amendment**

16 Plaintiff again alleges a violation of the Ninth Amendment. As Plaintiff previously was
17 informed, the Ninth Amendment provides that “the enumeration in the Constitution, of certain
18 rights, shall not be construed to deny or disparage others retained by the people.” *Strandberg v.*
19 *City of Helena*, 791 F.2d 744, 748 (9th Cir. 1986). While “[i]t has been argued that the ninth
20 amendment protects rights not enunciated in the first eight amendments[,] “the ninth amendment
21 has never been recognized as independently securing any constitutional right, for purposes of
22 pursuing a civil rights claim.” *Strandberg*, 791 F.2d at 748. “Causes of action based on the Ninth
23 Amendment fail to state a legal claim.” *Williams v. Fresno Cty. Dep’t of Soc. Servs.*, No. 1:21-
24 cv-00596-DAD-SAB, 2021 WL 3033578, at *6 (E.D. Cal. July 19, 2021) (citing *Ralls v.*
25 *Facebook*, 221 F.Supp.3d 1237, 1245 (W.D. Wash. 2016)). Plaintiff may not pursue a claim
26 pursuant to the Ninth Amendment.

27 **IV. Conclusion and Recommendation**

28 Based on the above, the Court finds that Plaintiff’s first amended complaint states a

1 cognizable claim against Defendants Fausnett and Verhoeven for excessive force in violation of
2 the Fourth Amendment and deliberate indifference to medical needs in violation of the Fourteenth
3 Amendment, but fails to state any other cognizable claims.

4 Despite being provided with the relevant pleading and legal standards, Plaintiff has been
5 unable to cure the remaining deficiencies and further leave to amend is not warranted. *Lopez v.*
6 *Smith*, 203 F.3d 1122, 1130 (9th Cir. 2000).

7 For the reasons stated above, IT IS HEREBY RECOMMENDED as follows:

8 1. This action proceed on Plaintiff's first amended complaint, filed on September 8,
9 2021, against Defendants Fausnett and Verhoeven for excessive force in violation of the Fourth
10 Amendment and deliberate indifference to serious medical needs in violation of the Fourteenth
11 Amendment; and

12 2. All other claims and defendants be dismissed from this action, without prejudice,
13 based on Plaintiff's failure to state claims upon which relief may be granted.

14 These Findings and Recommendation will be submitted to the United States District Judge
15 assigned to the case, pursuant to the provisions of Title 28 U.S.C. § 636(b)(1). Within fourteen
16 (14) days after being served with these Findings and Recommendation, Plaintiff may file written
17 objections with the Court. The document should be captioned "Objections to Magistrate Judge's
18 Findings and Recommendation." Plaintiff is advised that failure to file objections within the
19 specified time may result in the waiver of the "right to challenge the magistrate's factual
20 findings" on appeal. *Wilkerson v. Wheeler*, 772 F.3d 834, 839 (9th Cir. 2014) (citing *Baxter v.*
21 *Sullivan*, 923 F.2d 1391, 1394 (9th Cir. 1991)).

22
23 IT IS SO ORDERED.

24 Dated: October 18, 2021

/s/ Barbara A. McAuliffe
25 UNITED STATES MAGISTRATE JUDGE